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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS-R4-ES-2009-0022]

[4500030114]

RIN 1018-AX68

**Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat
for the Coquí Llanero**

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; reopening of comment period.

SUMMARY: We, the U.S. Fish and Wildlife Service, announce the reopening of the

public comment period on the October 12, 2011, proposed designation of critical habitat for the coquí llanero (*Eleutherodactylus juanariveroi*) (a tree frog) under the Endangered Species Act of 1973, as amended (Act). We are reopening the comment period to allow all interested parties an opportunity to comment on the proposed rule, our evaluation of the potential economic impacts of the proposed designation, and the amended required determinations section. Comments previously submitted need not be resubmitted, as they will be fully considered in preparation of the final rule.

DATES: The comment period for the proposed rule that published on October 12, 2011, at 76 FR 63420, is reopened. We will consider comments received on or before [INSERT DATE 30 DAYS AFTER DATE OF FEDERAL REGISTER PUBLICATION]. Comments must be received by 11:59 p.m. Eastern Time on the closing date. Any comments that we receive after the closing date may not be considered in the final decision on this action.

ADDRESSES: You may submit written comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal:

<http://www.regulations.gov>. Search for Docket No. FWS–R4–ES–2009–0022, which is the docket number for this rulemaking.

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R4–ES–2009–0022; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM;

Arlington, VA 22203.

FOR FURTHER INFORMATION CONTACT: Marelisa Rivera, Deputy Field Supervisor, Caribbean Ecological Services Field Office, P.O. Box 491, Road 301 Km 5.1, Boquerón, Puerto Rico 00622, by telephone 787-851-7297, extension 206, or by facsimile 787-851-7440. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Public Comments

We will accept written comments and information during this reopened comment period on our proposed designation of critical habitat for the coquí llanero (an endemic Puerto Rican tree frog) that was published in the **Federal Register** on October 12, 2011 (76 FR 63420), our evaluation of potential economic impacts of the proposed designation, and the amended required determinations provided in this document. We will consider information and recommendations from all interested parties. We are particularly interested in comments concerning:

(1) Additional information concerning the historical and current status, range, distribution, and population size of this species, including the locations of any additional populations of this species.

(2) Any information on the biological or ecological requirements of the species and ongoing conservation measures for the species and its habitat.

(3) Biological, commercial trade, or other relevant data concerning any threats (or lack thereof) to this species and regulations that may be addressing those threats.

(4) Current or planned activities in the areas occupied by the species and possible impacts of these activities on this species.

(5) The reasons why areas should or should not be designated as critical habitat as provided by section 4 of the Act (16 U.S.C. 1531 *et seq.*), including the possible risks or benefits of designating critical habitat, including risks associated with publication of maps designating any area on which this species may be located, now or in the future, as critical habitat.

(6) Specific information on:

(a) The amount and distribution of habitat for the coquí llanero;

(b) What areas, which were occupied at the time of listing (or are currently occupied) and that contain the physical and biological features essential to the conservation of this species, should be included in a critical habitat designation and why;

(c) Special management considerations or protection that may be needed for the essential features in critical habitat areas, including managing for the potential effects of climate change; and

(d) What areas not occupied at the time of listing are essential for the conservation of this species and why.

(7) Information on the projected and reasonably likely impacts of changing environmental conditions resulting from climate change on the species and its habitat.

(8) Any probable economic, national security, or other relevant impacts of designating any area that may be included in the final designation; in particular, any impacts on small entities or families, and the benefits of including or excluding areas that exhibit these impacts.

(9) Information on the extent to which the description of probable economic impacts of the proposed critical habitat designation is complete and accurate.

(10) Information on whether the benefits of an exclusion of any particular area may outweigh the benefits of its inclusion under section 4(b)(2) of the Act.

(11) Whether our approach to designating critical habitat could be improved or modified in any way to provide for greater public participation and understanding, or to assist us in accommodating public concerns and comments.

If you submitted comments or information on the proposed rule (76 FR 63420) during the initial comment period from October 12, 2011, to December 12, 2011, please do not resubmit them. We have incorporated them into the public record, and we will fully consider them in the preparation of our final determination, which will take into consideration all written comments and any additional information we receive during both comment periods. On the basis of public comments, we may, during the development of our final determination, find that areas proposed are not essential, are appropriate for exclusion under section 4(b)(2) of the Act, or are not appropriate for exclusion.

You may submit your comments and materials by one of the methods listed in the **ADDRESSES** section. We request that you send comments **only** by the methods described in the **ADDRESSES** section.

If you submit a comment via <http://www.regulations.gov>, your entire comment—including any personal identifying information—will be posted on the website. We will post all hardcopy comments on <http://www.regulations.gov> as well. If you submit a

hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so.

Comments and materials we receive, as well as supporting documentation we used in preparing the proposed rule and our evaluation of probable economic impacts of the proposed designation, will be available for public inspection on <http://www.regulations.gov> at Docket No. FWS–R4–ES–2009–0022, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Caribbean Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Background

It is our intent to discuss only those topics directly relevant to the designation of critical habitat for the coquí llanero in this document. For more information on previous Federal actions concerning the coquí llanero, refer to the joint 12–month petition finding, proposed listing of the species as endangered, and the proposed designation of critical habitat published in the **Federal Register** on October 12, 2011 (76 FR 63420, which is available online at <http://www.regulations.gov> at Docket Number FWS–R4–ES–2009–0022) or from the Caribbean Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Previous Federal Actions

On October 12, 2011, we published a proposed rule to list the coquí llanero as endangered and to designate critical habitat (76 FR 63420). We proposed to designate approximately 615 acres (ac) (249 hectares (ha)) in one unit located in Sabana Seca Ward, Toa Baja, Puerto Rico, as critical habitat. That proposal had a 60-day comment period, ending December 12, 2011. We will submit for publication in the **Federal Register** a final critical habitat designation for the coquí llanero on or before October 12, 2012. We received no requests for a public hearing, and, therefore, we will not hold any public hearings as part of this rulemaking.

Critical Habitat

Section 3 of the Act defines critical habitat as the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features essential to the conservation of the species and that may require special management considerations or protection, and specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. If the proposed rule is made final, section 7 of the Act will prohibit destruction or adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency. Federal agencies proposing actions affecting critical habitat must consult

with us on the effects of their proposed actions, under section 7(a)(2) of the Act.

Consideration of Impacts Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act requires that we designate or revise critical habitat based upon the best scientific data available, after taking into consideration the economic impact, impact on national security, or any other relevant impact of specifying any particular area as critical habitat. We may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area as critical habitat, provided such exclusion will not result in the extinction of the species.

When considering the benefits of inclusion for an area, we consider the additional regulatory benefits that area would receive from the protection from adverse modification or destruction of critical habitat as a result of actions with a Federal nexus (activities conducted, funded, permitted, or authorized by Federal agencies), the educational benefits of mapping areas containing essential features that aid in the recovery of the listed species, and any benefits that may result from designation due to State or Federal laws that may apply to critical habitat.

When considering the benefits of exclusion, we consider, among other things, whether exclusion of a specific area is likely to result in conservation; the continuation, strengthening, or encouragement of partnerships; or implementation of a management

plan. In the case of the coquí llanero, the benefits of critical habitat include public awareness of the presence of the coquí llanero and the importance of habitat protection, and, where a Federal nexus exists, increased habitat protection for the coquí llanero due to protection from adverse modification or destruction of critical habitat. In practice, situations with a Federal nexus exist primarily on Federal lands or for projects undertaken by Federal agencies.

We have not proposed to exclude any areas from critical habitat. However, the final decision on whether to exclude any areas will be based on the best scientific data available at the time of the final designation, including information obtained during the comment period and information about the potential economic impact of designation. Accordingly, we have evaluated the potential economic impact of the proposed critical habitat designation. A discussion of the potential economic impacts follows.

Evaluation of Potential Economic Impacts

Section 4(b)(2) of the Act and its implementing regulations require that we evaluate the probable economic impacts that may result from a designation of critical habitat, and to take into consideration these impacts when evaluating whether to exclude any particular area from a final critical habitat designation. To assess the potential economic impacts of a designation, we must first evaluate the impacts of restricting or modifying specific land uses or activities for the benefit of the species and its habitat

within the proposed critical habitat area. We then identify which conservation efforts may be the result of the species being listed under the Act versus those attributed solely to the designation of critical habitat. The economic impact of a proposed critical habitat designation is analyzed by comparing scenarios both “with critical habitat” and “without critical habitat.” The “without critical habitat” scenario represents the baseline for the analysis, considering protections already in place for the species (e.g., under the Federal listing as well as other Federal, State, and local regulations). The baseline, therefore, represents the costs of all efforts to conserve the species and its habitat incurred regardless of whether critical habitat is designated. The “with critical habitat” scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts are those not expected to occur absent the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat, above and beyond the baseline costs; these are the costs we may consider in the final designation of critical habitat when evaluating the benefits of excluding particular areas under section 4(b)(2) of the Act.

In our evaluation of the potential economic impacts that may result from the proposed designation of critical habitat for the coquí llanero, first we identified, in an Incremental Effects Memorandum dated October 12, 2011, potential incremental costs associated with the following categories of activity:

(1) Species and habitat management; (2) residential, commercial, or industrial development; (3) agriculture; (4) construction of new, or maintenance of, roads and highways; (5) maintenance (including vegetation removal or alteration) of drainage ditches; (6) construction or maintenance of recreational facilities; (7) construction and maintenance of telecommunication towers; (8) renewable wind power energy; (9) gas pipeline; (10) closure of landfill; and (11) transfer of Federal lands (Navy).

In this memorandum, the Service attempted to clarify the difference between the jeopardy and adverse modification standards for the coquí llanero critical habitat.

Because the designation of critical habitat for coquí llanero is being proposed concurrently with the listing, it is more difficult to discern which conservation efforts are attributable to the species being listed and those which will result solely from the designation of critical habitat. However, the following specific circumstances in this case help to inform our evaluation: (1) The essential physical and biological features identified for critical habitat are the same features essential for the life requisites of the species, (2) the current range of the coquí llanero is limited to the specific area identified as critical habitat, and (3) any actions that may affect the species or its habitat would also affect designated critical habitat. The Incremental Effects Memorandum outlines our rationale concerning this limited distinction between baseline conservation efforts and incremental impacts of the designation of critical habitat for this species. This evaluation of the incremental effects has been used as the basis to evaluate the potential incremental economic impacts of this proposed designation of critical habitat.

On the basis of our evaluation of the potential incremental effects, we have determined that almost all conservation-related efforts and activities will result from the protections afforded the species through State and Federal law once the species is federally listed. In other words, specific actions or efforts, or project modifications that may be recommended to conserve the species or its habitat, would be recommended because the species is protected under both State and Federal law. While it has been suggested (Vermont Law School, 2012) that the proposed Via Verde pipeline would adversely affect the coquí llanero and its proposed critical habitat, at this time the proposed alignment is not anticipated to cross or affect the habitat of the coquí llanero. Only in those cases where an action may affect the designated critical habitat and there is a Federal nexus (i.e., a Federal agency that is authorizing, funding, or permitting the action) would there be the additional requirement that the Federal action agency evaluate whether the action may adversely modify the designated critical habitat. This additional analysis by the Federal action agency is considered to be an incremental effect of the designation. While this additional analysis will require time and resources by both the Federal action agency and the Service, it is believed that, in most circumstances, these costs would predominantly be administrative in nature and also would not be significant. Because, in this circumstance, we believe that the incremental impacts of the designation, and therefore the potential economic impacts, would be limited to these administrative actions, we have determined that this rule will not result in a significant economic impact in any given year or result in a disproportionate economic impact to any particular sector.

Required Determinations—Amended

In our October 12, 2011, proposed rule (76 FR 63420), we indicated that we would defer our determination of compliance with several statutes and executive orders until we had evaluated the potential economic impacts of the designation and potential effects on landowners and stakeholders. Following our evaluation of the potential incremental economic impacts resulting from the designation of critical habitat for the coquí llanero, we have amended or affirmed our determinations below. Specifically, we affirm the information in our proposed rule concerning Executive Order (E.O.) 12866 (Regulatory Planning and Review), E.O. 13132 (Federalism), E.O. 12988 (Civil Justice Reform), E.O. 13211 (Energy, Supply, Distribution, and Use), the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), and the President’s memorandum of April 29, 1994, “Government-to-Government Relations with Native American Tribal Governments” (59 FR 22951). However, based on our evaluation of the potential economic impacts of the proposed designation of critical habitat for coquí llanero, we are amending our required determination concerning the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by

the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

When evaluating the potential effects of a proposed rulemaking on small entities, the RFA only requires that the agency analyze the potential impacts to directly affected entities. However, where practicable, the RFA recommends also evaluating the potential impacts to indirectly affected entities as well. To determine if the proposed designation of critical habitat for the coquí llanero would affect a substantial number of small entities, we must first evaluate whether any small entities may be directly affected by the designation.

The designation of critical habitat for an endangered or threatened species only has a regulatory effect under section 7 of the Act where a Federal action agency is involved in a particular action that may affect the designated critical habitat. Under these

circumstances, only the Federal action agency is directly affected by the designation, and, therefore, the requirements of the RFA allow for the Service to limit its evaluation of the potential impacts to only the Federal action agencies. There is no further requirement under the RFA to evaluate the potential impacts to indirectly affected entities, such as small businesses, organizations, or governments. As a consequence, we have determined that the proposed designation of critical habitat for the coquí llanero would not directly affect small entities.

Based on this determination, we certify that, if promulgated, the proposed critical habitat designation would not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required.

Authors

The primary authors of this notice are the staff members of the Caribbean Ecological Services Field Office, Southeast Region, U.S. Fish and Wildlife Service.

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Date: June 6, 2012

/s/ Eileen Sobeck

Acting Assistant Secretary for Fish and Wildlife and Parks

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